KIARA EMAS ASIA INDUSTRIES BHD A

v.

TETUAN WONG-CHOOI & MOHD NOR

HIGH COURT MALAYA, SEREMBAN B
AHMAD NASFY YASIN JC
[CIVIL SUIT NO: MT2-22-168-2002]
1 JUNE 2011

COMPANY LAW: *Suit by company - Negligence claim against solicitor advising company for listing purposes - Non-disclosure of material particulars in prospectus done in listing process - Liability - Whether solicitors engaged in listing exercise or directors of company responsible for issuing prospectus - Whether company suffered losses from relying on defective prospectus - Whether company proper party to sue solicitor - Whether cause of action established against solicitors - Whether causal link established between alleged negligence and losses - Companies Act 1965, ss. 42, 46(2) - Securities Commission Act 1993, s. 57* C D

LEGAL PROFESSION: *Duty of care - Negligence - Claim against solicitor advising company for listing purposes - Scope of solicitor's duty advising company in listing exercise - Whether duty pertained to legal expertise only - Companies Act 1965, ss. 42, 46(2) - Securities Commission Act 1993, s. 57* E

SECURITIES: *Securities legislation - Listing requirements - Non-disclosure of material particulars in prospectus issued in listing process - Liability - Whether solicitors engaged in listing exercise or directors of company responsible for issuing prospectus - Whether company suffered losses from relying on defective prospectus - Whether company proper party to sue solicitors - Whether cause of action established against solicitors - Whether causal link established between alleged negligence and losses - Companies Act 1965, ss. 42, 46(2) - Securities Commission Act 1993, s. 57 - KLSE Listing Requirements (2nd Board), ss. 7.40, 7.46, 7.48* F G H

The plaintiff engaged the services of the defendant firm of solicitors for the purposes of listing on the 2nd Board of the then Kuala Lumpur Stock Exchange ('KLSE'). The plaintiff was successfully listed but however brought this action against the defendant claiming that the defendant breached the terms of its appointment or negligently failed to exercise reasonable skill and I

care in its role as solicitors under the listing exercise. It was contended that the defendant failed to make full disclosure of material particulars as prescribed under the KLSE Listing Rules and Requirements relating to a charge, a shadow director and related party dealings in the prospectus that was done in the listing process. The omission to make such disclosure was the operative cause to the plaintiff being listed, albeit wrongly, and the subscribers misled by the omission to purchase the shares under the impression that the plaintiff was financially fit and sound when that was not the case. The issues for determination were (1) whether the proper party to claim for losses for relying on the defective prospectus was the shareholders of the plaintiff (2) whether there was a cause of action against the defendant and (3) whether there was a causal link and losses.

Held (dismissing the plaintiff's claim):

(1) It was the investors who had purchased shares in the plaintiff company that suffered losses upon reliance on the defective prospectus. The plaintiff did not rely on it but was responsible for issuing it with the misrepresentations. The plaintiff therefore did not suffer any loss and so could not sustain a suit against the defendant who had acted in the listing process. (paras 22-26)

(2) As the plaintiff's directors were responsible for the issuance of the prospectus, they owed a duty to potential subscribers to maintain the veracity of the content of the prospectus. If the information set out in the prospectus was wrong or misleading as alluded to by the plaintiff, the injury and consequent damages/losses were due to the plaintiff through its directors for failing to take reasonable care and not due to the negligence of the defendant. (para 30)

(3) Since the prospectus was issued for the benefit and at the instance of the plaintiff, the ownership of that prospectus must remain with the plaintiff. It was not proper for the plaintiff to disclaim ownership of the prospectus on the basis that some other person also had a hand in scrutinizing the document. (para 31)

(4) The partners of the defendant did not authorise the issuance of the prospectus for the consumption of the public. The defendant therefore was not liable under s. 46(2) Companies

Act 1965. The defendant should not have been made a party to the present suit and the suit itself should not have been initiated against the defendant. (para 33)

(5) The defendant was engaged by the plaintiff to assist in the listing exercise and the scope of its role was to take reasonable steps to verify issues of law in the prospectus and give legal advice for the same. The alleged breaches pertaining to the non-disclosures of the material particulars were purely factual and beyond the scope of the defendant's legal expertise. The liability of the defendant as an expert for the purpose of the listing exercise must be limited to those parts of the prospectus prepared by it and not to those parts where it might have assisted in the mere confirmation of a fact provided by the plaintiff itself. (para 34)

(6) The directors of the plaintiff being men of business should have been aware of the charge and shadow director issues which were in fact brought to the attention of the directors by the defendant. Knowledge of the essential facts alone was not sufficient to establish liability of a party such as the defendant (*NRMA Ltd & Ors v. Morgan & Ors*; foll). (para 35)

(7) The defendant was engaged to perform certain tasks which did not extend to checking on the main customers of the plaintiff and its subsidiaries. The plaintiff's contention that such dealings must be disclosed had no merit as it was not shown that such conduct was in accord with market practice. Conversely if such a practice was to be imposed, the floodgates would be opened since any solicitor conducting due diligence must scrutinise and lift every veil and pierce through layer after layer *ad infinitum*. Such a practice was impractical and would only result in a waste of time and costs. (para 37)

(8) The plaintiff made the decision to proceed with the listing exercise and engaged other parties apart from the defendant to assist in the exercise. There was a clear break in the chain of causation since the defendant's responsibility ended with the successful listing of the company. (para 39)

(9) The plaintiff's claim also failed on public policy grounds. The plaintiff's directors being responsible for the veracity of the prospectus issued, it followed therefore in accord with the maxim *ex dolo malo non oritur actio*, the court must not lend support for a case founded on the wrong committed by the company itself. The plaintiff could not profit from its own wrong. From the plaintiff's own pleaded claim, the cause of action appeared to arise *ex turpi* cause, *ie*, from the transgression of the KLSE Rules. On that premise, the court ought not to support the plaintiff's claim (*Holman v. Johnson; Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor; Mustafa Osman v. Lee Chua* (CA); refd). (para 41)

(10) The plaintiff's claim for damages in the amount of RM1, 243,549 was staggering and had no basis. The defendant's bill for work done inclusive of but not only for the listing came to a sum of RM111,777. There was no causal link between the successful listing of the plaintiff and the listing cost. The scope of the defendant's duty pertained to its legal expertise alone and not for its views on business matter. Similarly there was no causal link between the alleged negligence and the claims for contribution toward accumulated losses. (paras 42-44)

(11) The responsibility for the performance of the plaintiff rested on the shoulders of its directors who were answerable to the shareholders. The losses suffered had nothing to do with the defendant's role. The alleged losses were not foreseeable and were too remote. (para 44)

Case(s) referred to:

Bolam v. Friern Hospital Mamagement [1957] 2 All ER 118 ***(refd)***

Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***

Donoghue v. Stevenson [1932] 1 AC 562 ***(refd)***

Escott et al v. Bar Chris Construction Corporation et al 283 F Supp 643 [SDNY 1968] 697-8 ***(refd)***

Flavel v. Girogio [1990] 2 AC SR 568 ***(refd)***

Foo Fio Na v. Dr Soo Fook Mun & Anor [2002] 2 CLJ 11 FC ***(refd)***

Glasgow Corporation v. Muir And Others [1943] AC 448 ***(refd)***

Holman v. Johnson [1775] 1 Cowp 341 ***(refd)***

Ikumene Singapore Pte Ltd & Anor v. Leong Chee Leng [1992] 2 SLR 890 ***(refd)***

Mustafa Osman v. Lee Chua (P) [1996] 3 CLJ 494 CA ***(refd)***

Ng Pak Cheong v. Global Insurance Co Sdn Bhd [1995] 1 CLJ 223 HC ***(refd)***
NRMA Ltd & Ors v. Morgan & Ors [1999] 31 ACSR 435 ***(foll)***
Possfund Custodian Trustee Ltd & Anor v. Diamond and Ors [1996] 2 All ER 774 ***(refd)***
Registrar of Companies v. Brierly and Another [1965] NZLR 809 ***(refd)***
Roberts v. Ramsbotton [1980] 1 All ER 7 ***(refd)***
Sukatno v. Lee Seng Kee & Anor [2009] 4 CLJ 171 CA ***(refd)***
Teoh Guat Looi (The Lawful Widow) Claiming For Herself And Her Two Children As The Dependents Of Tay Kok Wah, Deceased v. Ng Hong Guan [1995] 1 CLJ 717 HC ***(refd)***
The Co-operative Central Bank Ltd v. KGV & Associates Sdn Bhd [2008] 2 CLJ 545 FC ***(refd)***
Wilsher v. Essex Area Health Authority [1988] AC 1074 HL ***(refd)***
Wu Slew Ying v. Gunung Tunggal Quarry & Constructions Sdn Bhd & Anor [2011] 1 CLJ 409 FC ***(refd)***

Legislation referred to:
Capital Markets and Services Act 2007, s. 248
Companies Act 1965, ss. 4, 42, 46(2), 57
Securities Commission Act 1993, s. 57

Companies Act 1970 [Sing], s. 207

For the plaintiff - Brian Ernest Cumming; M/s Gideon Tan Razali Zaini
For the defendant - Wong Kah Hui; M/s Jeff Leong, Poon & Wong

Reported by Usha Thiagarajah

JUDGMENT

Ahmad Nasfy Yasin JC:

The Case In Outline

[1] The case in a nutshell, concerns the men of law who ply their trade as solicitors and the public client who choose to employ their services and the conflict that arose as a result of the services. The client, plaintiff, now claimed the defendant had wronged it and the defendant denied it, a case of diametrically opposite positions; reminiscent of the Shakespearean celebrated play; of Plantagenet and Sommerset when plucking the white and red roses in the Temple garden, London:

A Plantagenet – The truth appears to be naked on my side
That any purblind eye may find it out.

Sommerset – And on my side it is so well apparell'd
That it will glimmer through a blindman's eye

B Henry VI Act II Sc. IV.

[2] Despite its mundane appearance, this case raised a novel and important question whether a solicitor advising the company for the purpose of listing is liable to that company in negligence.

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The Setting Leading To The Dispute

[3] In or around the end of 1996 the plaintiff wanted to be listed on the 2nd Board of the then Kuala Lumpur Stock Exchange. For that purpose, it needed the services of solicitors. D So it appointed the defendant.

[4] The defendant did its job and the plaintiff was successfully listed on the 2nd Board of the KLSE in April 1997. One of the things that had to be done in the listing process was preparing E the prospectus. This will appear prominently in the dispute, which I will allude to later in this judgment. Now back to the narrative.

The Plaintiff's State Of Play

F **[5]** The plaintiff now claims that it should not have been listed in the first place. It was wrongly listed in the sense that it should not have been listed at all in the first place but was listed as a result of material particulars which were not disclosed by the defendant. In other words, the plaintiff was listed as a result of G the defendant's omission and/or failure to make full disclosure relating to a charge, the existence of a shadow director and the related party dealings in the prospectus. The plaintiff contends that all these must be disclosed as prescribed under the KLSE listing rules and requirements.

H **[6]** The plaintiff's claim as pleaded in paras. 6A-C statement of claim ("SOC) stated that the omission to make such disclosure was the operative cause to the plaintiff being listed, *albeit* wrongly, and the subscribers being misled by the omission to purchase the shares under the impression that the plaintiff was financially fit and I sound, when this was not the case.

[7] In brief, the plaintiff states that the defendant owes it, the company a duty of care, broadly comprising:

(i) Confirming the truth of the prospectus for listing of the plaintiff to the best of its knowledge;

(ii) Giving full and frank disclosure of any matters for listings of the plaintiff of which it had knowledge;

(iii) Advising the plaintiff as to the statutory and regulatory requirement of listing.

[8] The plaintiff alleged that the defendant breached the terms of its appointment or negligently failed to exercise reasonable skill and care in its role as solicitors under the listing exercise.

The Defendant's Flip Side

[9] On the other hand, the defendant denies any breach of the terms of its appointment and/or that there was negligence in carrying out its role as solicitors under the listing exercise. The defendant canvassed the following reasons:

(i) The prospectus dated 20 February 1997 prepared for listing purposes was prepared by the Merchant Bank, Sime Merchant Bankers Berhad (now vested with Public Bank Berhad).

(ii) The terms of the defendant's engagement was as a legal adviser to advise on the listing and legal issues thereto.

(iii) The responsibility and duty rested on the plaintiff, its officers and advisers with respect to the authorities and investors who would rely on the prospectus and not the defendant.

(iv) The directors of the plaintiff and the Merchant Bank had made representations in the prospectus that the contents of the said prospectus were accurate and correct and they would take responsibility for the contents of the prospectus.

(v) There is no causal connection (pleaded or evidence) that the listing lead to the losses claimed.

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Issues

[10] The facts as presented in the narrative above commands me to consider the following issues: first, whether the plaintiff herein is the proper plaintiff; secondly, whether there is a cause of action against the defendant; and thirdly whether there is a causal link and losses.

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Rival Submissions

[11] Learned counsel for the defendant has raised a preliminary whereby it was strenuously argued that the whole basis of the plaintiffs claim as set out in para. 3.1 to 3.4 of statement of claim (SOC) is obviously misconceived. It was argued that the crux of the plaintiff's allegation is that consequent of prospectus in effect being "defective" losses were suffered on the listing of the plaintiff company.

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[12] The learned counsel went on to state that the absolute key question that the court has to consider is as to who is the actual party that suffers loss from relying on such a 'defective' prospectus? The undeniable conclusion is that it is the investors (ie, the persons who purchase or subscribe for shares in the company on the faith of a 'defective' prospectus who will suffer the losses).

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[13] The counsel further stated that it is patently clear however that the claim has been filed by the plaintiff's company and not by the shareholders who purchased or subscribed for shares in the plaintiff on the faith of the prospectus issued in connection with its listing. It follows therefore that the claim before this court whereby the litigant is the plaintiff company, it is in fact an ingenious attempt by the plaintiff to mount a claim in respect of an alleged 'defective' prospectus as a claim for its own losses (see para. 10 of statement of claim), not that of its shareholders who bought shares on the faith of the alleged 'defective' prospectus.

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[14] Learned counsel for the defendant further submitted that the terms of the defendant's appointment and the extent of its obligation, was to take reasonable steps to verify issues of law in the prospectus and give legal advice for the same. Any other conclusion or imposition of a wider duty would be repugnant and would open a very real floodgate of litigation for the following reasons:

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(i) The plaintiff's directors were responsible for issuance of the prospectus as provided under s. 42 of the Companies Act 1965 ("CA") and s. 57 of the Securities Commission Act 1993 ("SCA")

(ii) The parties of the defendant legal firm were neither the directors of the plaintiff nor promoters nor authorized the issue of the prospectus for the consumption of IPO subscribers in line with s. 46(2) of the Companies Act 1965.

(iii) The defendant in the course of conducting due diligence on the plaintiffs subsidiaries had found there to be a charge created by the plaintiff's subsidiary, Zoomlink Development Sdn Bhd ("Zoomlink") in favour of Hong Leong Bank Berhad ("HLB") over a piece of land known as Lot PT 17395 for facilities granted to an unrelated company by the name of Ardent Link Sdn Bhd ("Ardent Link"). The defendant has warned the plaintiff that if there was no discharge of the charge, the fact of the existence of the charge would have to be disclosed in the prospectus. The above facts clearly show that the defendant was in no way assisted/participated intentionally and purposely in the contravention of the breach alleged.

(iv) There is no evidence to prove that there was a hidden director behind the plaintiff by the name of Dato' Tan Hooi Chong ("Dato' Tan"). Dato' Tan held no posts either in the plaintiff or in any of its subsidiaries, as shown by a search conducted on the relevant companies. There was consequently no breach by the defendant of duty to depose as to Dato' Tan in the prospectus since the said individual was not a shadow director and not material.

(v) The defendant was engaged to perform certain tasks, which did not extend to checking on the main customers of the plaintiff and its subsidiaries.

[15] In short, the thrust of the defendant's argument was that the plaintiff's statement of claim and the evidence tendered at trial have failed to disclose and support a reasonable cause of action against the defendant for negligence and consequently the defendant is not liable for losses claimed.

[16] Learned counsel for the plaintiff conversely submitted that the defendant's submission to the effect that only the shareholders can sue to recoup its losses is misconceived in fact and in law as the shareholders need not sue in their own names but can do so in the name of the company, if they so decide. Thus it is clear that the present claim for the cost of listing and a contribution towards accumulated losses which are to be assessed also includes losses suffered by the subscribers and share holders which are in fact being recouped in the name of the company itself.

[17] The plaintiff contends that the defendants being a firm of professional solicitors professing to have expertise in the listing of companies and engaged to provide legal advice as to the contents of the prospectus and listing rules, owed a duty of care to the plaintiff and/or the shareholders, and the defendant could reasonably foresee the plaintiff and/or the shareholders would suffer losses as a result of the breach ie, failure to disclose the charge, failure to disclose existence of a shadow director and failure to highlight related party dealings in the prospectus.

[18] The plaintiff's counsel further argued that exh. 58 at pp. 790-791 bundle B2 which is the defendant's letter dated 29 January 1997, depicts that it is the only document purporting to address the issue of the charge on the land and that before the plaintiff is able to respond to the said letter, the defendant then issued two other letters on the same day, both dated 29 January 1997 to Sime Merchant Bankers Berhad (exhs. P5 & P62). According to the counsel these three letters of the defendant merit further consideration. The first thing to note is that the letter to the plaintiff dated 29 January 1997 is a mere query of the connection between the borrower and charger as well as whether the provision of the charge is in the ordinary course of the charger's business. The letter is only a request for confirmation and does not in any way attempt to provide the plaintiff with legal advice that a disclosure of the charge is mandatory pursuant to Section 7.46 KLSE Listing Requirement (2nd Board). The correspondence also failed to legally advice the plaintiff of the requirement to disclose the existence of Dato' Tan Hooi Chong as a shadow director in the prospectus pursuant to Section 7.48 and the existence of related party dealings pursuant to Section 7.40 KLSE Listing Requirement (2nd Board).

[19] The plaintiff contends that as a result of the wrongful listing, the plaintiff has suffered losses. The causal link is not between the successful listing of the plaintiff and the subsequent losses suffered as a result of trading post listing as alleged by the defendant. Rather, the omission of the particulars as required by the KLSE Listing Requirement and failure to advise the plaintiff of the breach of the said rules caused the plaintiff to forge ahead with wrongfully listing and suffering the losses claimed as a direct consequences.

My Approach To The Issues

[20] It is apposite at this juncture to remind myself that it is trite law that the plaintiff shoulders the burden of proof. Abdul Malik J (now JCA) had succinctly stated this principle of law in *Teoh Guat Looi (The Lawful Widow) Claiming For Herself And Her Two Children As The Dependents Of Tay Kok Wah, Deceased v. Ng Hong Guan* [1995] 1 CLJ 717, in the following words:

> In civil cases, a party must prove his case before the burden shifts to the other side. In criminal case, the prosecution's burden is a heavy one to prove beyond reasonable doubt. In a civil case, it is on the balance of probabilities. That balance must be tilted by the Plaintiff before the Defendant makes his case.

[21] The plaintiff's cause of action is founded in negligence. Thus it is incumbent on the plaintiff to establish that the defendant owes a duty of care and that, that duty has been breached causing the loss and damage on the part of the client, the plaintiff. In determining the issue of negligence I consider the following propositions to be trite:

(i) That not every commission and/or omission would give rise to an action in negligence. It is for the court to determine a particular fact pattern, whether there is a duty, either by way of statutory duty or that implied by law exists in the facts – see *Donoghue v. Stevenson* [1932] 1 AC 562; *Wu Slew Ying v. Gunung Tunggal Quarry & Constructions Sdn Bhd & Anor* [2011] 1 CLJ 409 FC; *The Cooperative Central Bank Ltd v. KGV & Associates Sdn Bhd* [2008] 2 CLJ 545 FC;

(ii) The legal standard is based on an objective determination and not based on the tortfeasor. In other words, the objective determination is by comparing an apple with another apple (not an apple with an orange) or a man on the clapham

omnibus with the other person and between a professional and his peers and not with an ordinary person on the street – see *Glasgow Corporation v. Muir And Others* [1943] AC 448; *Wilsher v. Essex Area Health Authority* [1988] AC 1074 HL; *Sukatno v. Lee Seng Kee & Anor* [2009] 4 CLJ 171 CA; *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2002] 2 CLJ 11;

(iii) The evidence that a tortfeasor acted *bona fide* and to the best of his ability is insufficient to exonerate liability if the action fell below the objective standards – see *Roberts v. Ramsbotton* [1980] 1 All ER 7;

(iv) In respect of persons professing a particular skill the degree of care required is that of an ordinary competent person exercising that skill – see *Bolam v. Friern Hospital Mamagement* [1957] 2 All ER 118

Issue 1 – Must The Shareholders Sue Instead Of The Plaintiff?

[22] The crux of the plaintiff's claim is that as a consequence of the prospectus in effect being 'defective', losses were suffered on the listing of the plaintiff company. The key question to be considered is who is the actual party that suffered the losses from relying on such a 'defective' prospectus?

[23] I agree with the submission by the defendant's counsel that the undeniable conclusion is that it is the investors (ie, the persons who purchased on subscribe for shares in the company on the faith of a 'defective' prospectus) who suffered the losses.

[24] To my mind the case of *Ikumene Singapore Pte Ltd & Anor v. Leong Chee Leng* [1992] 2 SLR 890 as cited by the plaintiff is irrelevant as to how the claim should be initiated, since it is based on a finding of a duty care based on a specific piece of Singaporean Legislation relating to reporting duties of an auditor, per s. 207 of the Companies Act (Cap 185, 1970). In other words, there is no such equivalent provision which applies to solicitors in Malaysia.

[25] If the correct party who should have, but did not initiate the suit, is the shareholder, it is critical to note that the aggrieved shareholder could have but did not, file a statutory claim to recoup on losses. This right has evolved and been bolstered as can be seen in the change in the function of statute, stemming

from s. 57 of the Securities Commission Act 1993 and giving way to s. 248 of the Capital Markets and Services Act 2007 ("CMSA"), arising from amongst other factors, corrupt directors causing hurt to the interest of subscribers and shareholders not being addressed.

[26] In the circumstances, I am of the view that it is the company, which did not rely on the prospectus but in fact issued and included so called misrepresentations in it and consequently suffered no loss from reliance in the prospectus, cannot sustain a suit against the solicitors who acted in the process.

Issue II – Is There A Cause Of Action Against The Solicitors?

[27] The plaintiff pleads at para. 6 of statement of claim that the duty owed by the defendant to the company is:

> ... to exercise all due professional skill and care in the performance of his duties ... .

It is pertinent to state that the terms of the defendant's appointment and the extent of its obligation, was to take reasonable steps to verify issues of law in the prospectus and give legal advice for the same.

[28] In this case, I find that the plaintiff's directors were responsible for issuance of the prospectus:

'Prospectus' as defined the under s. 4 of Companies Act 1965 means:

> any prospectus, notice, circular, advertisement or invitation inviting applications or offers from the public to subscribe for or purchase or offering to the public for subscription or purchase any shares in or debentures of or any units of shares in or units of debentures of a corporation or proposed corporation and, in relation to any prospectus registered under the Securities Commission Act, 1993, means a prospectus as defined under that Act.

[29] Looking at the law and the evidence before this court, it is my finding that the duty to maintain the veracity of the content of a prospectus is owed by the company and its board of directors to the potential subscribers, as it is the company and its board that authorizes and caused the issue of the prospectus. Reference may be made to the following provisions of the relevant legislations. Section 42 of the Companies Act 1965 states:

A (2) The Registrar shall not register a copy of any prospectus if it contains any statement or matter which is in his opinion misleading in the form and the context in which it is included and unless:

B (a) The copy signed by every director and by every person who is named therein as proposed director of the corporation or by his agent authorized in writing is lodged with the registrar on or before the date of its issue ... .

C Section 57 of the Securities Commission Act 1993 states:

(1) A person who acquires, subscribes for or purchases securities and suffers loss or damage as a result of any statement or information contained in a prospectus that is false or misleading, or any statement or information
D contained in a prospectus from which there is material omission, may recover the amount of loss or damage from all or any of the persons set out in paragraphs (a), (b) ...

(a) the issuer and each director of the issuer at the time of the issue of the prospectus, for any loss or damage;

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(b) a person who consented or caused himself to be named and is named in the prospectus as a director or as having agreed to become a director, either immediately or after an interval of time, for any loss or damage;

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[30] Clearly, in our case herein, if the plaintiff's directors are responsible for issuance of the prospectus, and if the information set out therein is wrong or misleading as alluded to by the plaintiff
G in its own claim, the injury and consequent damages/losses are due not to the defendant, but to the plaintiff through its directors for failing to take reasonable care (see *Flavel v. Girogio* [1990] 2 AC SR 568, *Registrar of Companies v. Brierly and Another* [1965] NZLR 809).

H In the case of *Ng Pak Cheong v. Global Insurance Co Sdn Bhd* [1995] 1 CLJ 223 at p. 235 is stated as follows:

In *Spedley Securities Ltd v. Greater Pacific Investments Pty Ltd* [1991] 7 ACSR 155, the Supreme Court of NSW Australia had occasion
I to consider a round - robin transaction undertaken by the directors of a company to "clean-up" the balance sheet. In stating that the whole purpose of this transaction was to mask the true state of the company accounts, the Court observed at page 173 (45-50).

> **A director owes a duty to the company which he directs to act honestly and with a reasonable degree of care in the performance of his function as a director**. Such a duty is imposed by the general law and by Section 229 of the Companies Act (NSW) Code (see for instance *Jeffree v. National Companies & Securities Commission* [1989] 15 ACLC 556 at 560, 565 and cases there collected). *It is dishonest and a breach of such duty to seek to disguise the true state of accounts of a company. To do so misleads shareholders, creditors, and regulatory authorities. The purpose of the round robins was thus a dishonest purpose and their implementation constituted a breach of fiduciary duty*. (Emphasis added).

[31] To sum up, it is my considered view that the primary liability for the issuance of the prospectus rests with the directors of the plaintiff and that persons issuing the prospectus in the present case are not the defendant and since the prospectus was issued for the benefit and at the instance of the plaintiff, the ownership of that prospectus must remain with the plaintiff. I, for once, do not think it to be proper for the plaintiff to disclaim ownership of the prospectus on the basis that some other person also had a hand in scrutinizing the document.

[32] Whilst I accent that it is legally possible for a third party who subscribed the shares based on the representations set out in the prospectus to bring an action not only against the directors and the company but to other persons involved in making that representation as shown in the recent case of *Possfund Custodian Trustee Ltd & Anor v. Diamond and Ors* [1996] 2 All ER 774 it is my judgment that in the present case the plaintiff has not convincingly shown that it is entitled to the relief claimed.

Issue III – Causal Link And Loss

[33] At the risk of repetition, in my judgment, the partners of defendant legal firm were neither the directors of the plaintiff nor of the promoters nor authorized the issue of the prospectus for the consumption of the public. Thus, the defendant legal firm is not liable as a person who has authorized or caused the issue of prospectus as enunciated in s. 46(2) of the Companies Act 1965. Consequently the defendant should not have been made party to this suit and the suit itself should not have been initiated against the defendant.

[34] It is my finding that the defendant was engaged by the plaintiff to assist in the listing exercise and consequently, can perhaps be called expert (as defined under s. 4 of the Companies Act 1965) for the purpose of the listing exercise, and indeed the scope of its role was to take reasonable steps to verify issues of law in the prospectus and give legal advice for the same. Thus, the alleged breaches ie, material non-disclosure of an illegal charge, failure to disclose hidden directors and substantial shareholdings; and failure to highlight related companies dealing are purely factual and beyond the scope of the defendant's legal expertise. In other words, the liability of the defendant as a so-called expert must surely be limited to the parts of the prospectus prepared by it and not for example, in those other parts of the prospectus where it may have assisted in mere confirmation of fact provided by the plaintiff itself (see *Escott et al v. Bar Chris Construction Corporation et al* 283 F Supp 643 [SDNY 1968] 697-8).

[35] It is also my finding that the defendant had brought to the attention of the directors of the charge issue, and in respect of the existence of the shadow directors it is unthinkable in my mind the directors of the plaintiff, being men of business themselves are unaware of the same. The fact the same was not brought to the attention of the directors at the earliest opportunity cannot now be used as a weapon in its assault against the defendant. In fact, a closer scrutiny of the SD1 evidence showed that he had through direction from SD2 informed the plaintiff's then company secretary, Joanne Lau about the charge created by the plaintiff's subsidiary Zoomlink Development Sdn Bhd ("Zoomlink" in favor of Hong Leong Bank Berhad ("HLB") over a piece of land known as lot PT 17395 for facilities granted to an unrelated company by the name of Ardent Link Sdn Bhd ("Ardent Link"). On 29 January 1997, SD2 had enquired with the plaintiff's board of directors as to the charge, warned that if there was no discharge, the charge would need to be disclosed in the prospectus and had been informed that the charge would be discharged prior to listing, and given assurance by the plaintiff's board of directors as to the same by way of two letters dated 11 March 1996 (eks. D60) sent by Ardent Link to HLB requesting a discharge of charge and a reply from HLB dated 30 March 1996 (exh. D61) agreeing to the discharge of charge. SD1 also took a step further at another meeting for listing showing the board of directors, the charge and

the letters dated 11 March 1996 and 30 March 1996 and was informed by the plaintiff's said board and its principal banker that the charge would certainly be discharged prior to listing. In the circumstances it clearly shown that the defendant in no way assisted/participated intentionally and purposely in the contravention of the breach alleged and as has been recognized in *NRMA Ltd & Ors v. Morgan & Ors* [1999] 31 ACSR 435 (SC NCW) where Giles J, ruled that knowledge of the essential facts alone is not sufficient to establish liability of a party such as the defendant since:

> only in unusual circumstances would an advisor incur accessorial liability.

[36] As regard to the failure to disclose a hidden director, I found that there is no evidence to prove that there was a hidden director behind the plaintiff by the name of Dato' Tan Hooi Chong ("Dato' Tan"). Dato' Tan held no post either in the plaintiff's company or in any of its subsidiaries, as shown by searches conducted on the relevant companies. Thus there was consequently no breach by the defendant of duty to depose as to Dato' Tan in the prospectus since the said individual was not a shadow director and not material. However, all instructions given to the defendant (as confirmed by SD1 and SD2) with respect to the listing exercise came from the plaintiff's board of directors alone. Dato' Tan did not sit in on any meetings concerning the listing, nor did the defendant take any instruction from him. The defendant liaising with Dato' Tan with respect to the discharge of charge as set out in para. 12(c) of the statement of defence and the further and better particulars does not amount to taking instructions from the said individual.

[37] It is my finding that the defendant was engaged to perform certain tasks, which did not extend to checking on the main customers of the plaintiff and its subsidiaries. The plaintiff's contention that such dealings must be disclosed has no merit as I have not been shown that such conduct is in accordance with market practice. Conversely, if such a practice were to be imposed I fear that the floodgates will be opened since any solicitor conducting due diligence must scrutinise and lift every veil and pierce through layer after layer *ad infinitum*. Such a practice in my view is impractical and would only result in an increase in time wastages and costs.

[38] In any event, the searches conducted against Zoomlink Holding Sdn Bhd, Pantai Indah Sdn Bhd, T Hakkim Sdn Bhd, Pasir Gudang Bus Supply Sdn Bhd and South Johor Omnibus Sdn Bhd (exh. P65, P67, P68 and P2, P25 and P26) does not reveal them as related companies. The plaintiffs contention that the related party dealings would 'strangle' cash flow and wrongly induce investors to invest in an extremely skewered and deliberately simplistic view of the plaintiff's business at the material time, as the truth of the matter as laid out in the prospectus was that the plaintiff's client base was wide and secure and included several major listed companies including Malaysia Airline Systems, Polis Di Raja Malaysia, Resorts World Berhad, as well as Mara Holdings Sdn Bhd and is not limited to the companies named by the plaintiff.

[39] The plaintiff's allegation that the defendant should have taken into cognizance the fact that the plaintiff was in unfit financial condition, was badly managed and had a large amount of dealings with the related companies, and premised on which, the defendant should have reasonably foreseen that the plaintiff would ultimately be unprofitable and that the plaintiff and its shareholders would suffer losses is unsustainable. For the plaintiff itself had made a decision to proceed with the listing exercise and engage other parties including the defendant to assist with their various roles in the exercise. There is however a clear break in the chain of causation supposedly leading to losses, since the defendant's responsibility ended with the successful listing of the company.

[40] To sum up once again, I hold that the defendant being the solicitors firm, acting for the plaintiff cannot be found liable to the plaintiff for negligence in the publication of the prospectus since the non-disclosure complained of, occurred as a result of the plaintiffs own doing.

[41] It is my view that apart from the above there is yet another reason why the plaintiff's claim must fail: the public policy reason. Following through with the above notion that the plaintiff's director(s) are responsible for the veracity of the prospectus issued, it follows therefore, that in accord with the maxim *ex dolo malo non oritur actio*, this court must not lend support for a case founded on the wrongs committed by the company itself. In other words the plaintiff cannot profit from its own wrong. It is my finding that from the plaintiff's own pleaded claim, the cause of

action appears to arise *ex turpi causa*, namely from the transgression of the KLSE Rules, On this premise, I am of the view that the court ought not to support the claim of the plaintiff, not for the sake of the defendant, but because they will not lend their aid to the plaintiff (see *Holman v. Johnson* [1775] 1 Cowp 341 as applied by the Supreme Court in *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57: Court of Appeal in *Mustafa Osman v. Lee Chua (P)* [1996] 3 CLJ 494).

Claim For Damages

[42] It follows from the above that the defendant is not liable for the plaintiff in respect of the alleged negligence. For completeness, I will say a few words on the claim for damages. In this case the plaintiff claims for two main forms of losses, that is:

(a) The cost of the listing exercise amounting to RM1,243,549; and

(b) A contribution towards the accumulated losses of the plaintiff amounting to RM90,401,905 to be assessed.

[43] I must say at once that the claim of damages is staggering. That said, I found no basis for claiming the cost as listing as a loss. This amount, as I can only assume there being no particulars furnished, pertains to the operational expenses of the plaintiff classified for the purpose of the listing exercise, such as Merchant Banker Fees, Accountant Fees, etc. The defendant's bill for work done inclusive of, but not only for the listing came to a sum of RM111,770. To my mind there is no casual link between the successful listing of the plaintiff and the cost of the listing as a loss. The scope of the defendant's duty pertains to its legal expertise alone and not for its views on business matter.

[44] Similarly there is no causal link between the alleged negligence and the claims for contribution toward accumulated losses. I do not for a moment think that the plaintiff, even if it is able to prove the defendant liable, could claim damages under this head as there is a direct result between the commission and omission and the losses. Various reasons can be attributed for the waning financial welfare of any company, some of which are beyond the company's own control, such as with an economic

A downturn. By and large, the responsibility for the performance of the plaintiff rests on the shoulders of its directors who are answerable to the shareholders. Whatever the reason for the losses suffered, it had nothing to do with the defendant solicitors' role whatsoever. In short, the alleged losses are not foreseeable
B and are too remote.

Conclusion

[45] Having considered the entire case and the submission by both parties I hold that the plaintiff has not proved its case against
C the defendant.

[46] Accordingly the plaintiff's claim is dismissed with costs to be taxed, unless otherwise agreed.

D **[47]** Being dissatisfied with my decision herein, the plaintiff now appeals to the Court of Appeal.

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